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Supreme Court of the United States

No. 189

A. M. MacNEIL,
PETITIONER,

v.

BENJAMIN GARGILL, TRUSTEE,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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The Petitioner, A. M. MacNeil, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the First Circuit entered in this case on March 30, 1956.

Citations to Opinions Below

The opinion of the Court of Appeals is reported in 231 F.2d ; and is printed in the Appendix B hereto *infra* p. 23. The District Court entered its orders without opinion, see R. p. 77; 40 and are not reported. The referee in bankruptcy gave no opinions and therefore none are reported.

Jurisdiction

The judgment of the Court of Appeals was entered on March 30, 1956. See R. p. 131, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Whether there is any valid jurisdiction of a petition under section XI of the Bankruptcy Act in the absence and positive striking out of a petition under said section of all allegations of inability to pay debts as they mature and of insolvency.

2. Whether the Courts of the United States have abrogated the duties of making no determinations of fact in important matters without the receipt of evidence substantiating the contentions of fact made in the absence of agreement upon facts claimed, contrary to the law set forth in *Baltimore and Ohio Railroad* v. *United States*, 264 U.S. 258, and the Constitution of the United States.

3. Whether the Courts can deny to an applicant or petitioner under the Bankruptcy Act, Title 11, Chapter 11, Sections 701-799 the right to attempt to effect an arrangement with its creditors or payment of them in full by an immediate order of adjudication without notice of proposed arrangement offered ever being sent to creditors under the provisions of section 335 of said chapter and Act, and without any opportunity being given to said creditors or the debtor to receive and file acceptances of the proposed arrangement offered.

Constitutional Provisions Statutes and Rules

1. The Statute Title 11, section 323 of the U.S.C. provides: "A petition filed under this chapter shall state that

the debtor is insolvent or unable to pay his debts as they mature, and shall set forth the provisions of the arrangement proposed by him."

2. U.S.C. Title 11, Sections 334 and 335 provide: "The Court shall promptly call a meeting of creditors, upon at least ten days notice by mail to the debtor, the creditors and other parties in interest. The notice of such meeting of creditors shall be accompanied by a copy of the proposed arrangement, a summary of the liabilities as shown by the schedules and a summary of the appraisal, if one has been made, or if not made a summary of the assets as shown by the schedules. Such notice may also name the time for the filing of the application to confirm the arrangement and the time for the hearing of the confirmation and of such objections as may be made to the confirmation."

3. Amendment numbered 4 of the United States Constitution provides: "The right of the people to be secure in their persons, houses papers and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

4. Amendment numbered 5 of the Constitution of the United States provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Statement of the Case

This was a petition filed allegedly under Chapter XI of the Bankruptcy Act for an arrangement. However, the petition lacked jurisdictional averments, essential for proper petition. Record page 135 of opinion of Court of Appeals. Upon filing of said petition the M. A. Owens Company petitioner through Appellant filed thereafter a motion to dismiss petition prior to any action by court thereon. (Record, 19). Upon filing of motion to dismiss all proceedings the Referee to whom the matter had been referred sent out notices to the effect that a hearing would be held in reference to the motion to dismiss all proceedings and that at said hearing consideration would be given to entering an order of adjudication. (Record, 20). This was the only notice sent and did not conform to the notice required by statute under sections 334 and 335 of the Act. These read as follows:

> Section 334. The Court shall promptly call a meeting of creditors, upon at least ten days notice by mail to the debtor, the creditors and other parties at interest.
>
> Section 335. The notice of such meeting of creditors shall be accompanied by a copy of the proposed arrangement a summary of the liabilities as shown by the schedules and a summary of the appraisal if one has been made, or if not made a summary of the assets as shown by the schedules. Such notice may also name the time for filing the application to confirm the arrangement and the time for hearing of the confirmation and of such objections as may be made to the confirmation.

Thereafter immediately upon warning that the notice that the Referee may adjudicate the petitioner a bankrupt at the said hearing because of its having filed a motion to dismiss all proceedings and realizing that there was no provision in the Act for such adjudication by the Referee for making such adjudication but in order to remove the supposed cause for even consideration of the adjudication filed a withdrawal of the motion to dismiss all proceedings. Thereafter on the date of the supposed hearing without motion of any party or any allegation of insolvency or inability to pay debts as they mature or any reception of evidence whatever as required by the law the referee entered an order of adjudication of the said petitioner as a bankrupt. Thereafter he proceeded to enter orders concerning the property of the petitioner M. A. Owens Company, disposing of some of it by sale. The Appellant, Petitioner in these proceedings as counsel claimed reviews to the Judge of the District Court from the orders of adjudication as well as the failure of the Referee to receive evidence before taking action on the matters of adjudication sales and other actions by him taken. The judge of the District Court sustained the action of the Referee on all matters without opinion. The Petitioner in his individual capacity claimed a review from the actions of the referee setting forth as cause for said review the lack of jurisdiction in the whole proceedings and that the rights of the M. A. Owens Company had not been repudiated. The M. A. Owens Company as well as the present petitioner appealed from the action of the Judge of the District Court.

The Court of Appeals ordered a dismissal of the Appeal of M. A. Owens Company for the reason that the Bond on Appeal given by it was signed by its chief financial officer but no written power of attorney attached thereto and no corporation seal affixed thereto. The said

bond was a surety company bond executed by a surety company qualified and approved by the District Court. The said Bond purported to be sealed by the wording contained therein. The powers of attorney to execute said bond by the agent of the surety company were attached thereto. The seal of the surety Company was affixed thereto. Motion was made by the M. A. Owens Company for leave to affix a seal to said bond and to furnish written power of Attorney to execute said bond by the person so signing but the Court of Appeals denied such leave and dismissed appeal for failure to furnish proper bond. It appears that the said bond had been received for filing without objection by the clerk of the District Court's assistant. Thereafter the case proceeded on the appeal of the individual appellant the present petitioner.

At the hearing before the Court of Appeals motion was made to dismiss all proceedings for lack of jurisdiction in the Court for lack of essential averments in the original petition. The Court in its opinion found that the essential allegations in the original petition were in fact lacking and that the petition should have been dismissed even without hearing. No amendment has ever been made to the said petition. The Court of Appeals entered orders sustaining the orders of the District Court. Which in turn sustained the actions of the Referee. The petitioner appeared throughout the entire proceedings as attorney for the M. A. Owens Company and at times for others at interest.

Reasons for Granting the Writ

The decision of the Court below affirming the orders of the District Judge who in turn sustained the actions of the Referee appear to be in direct conflict with the laws as decided by this court on several occasions. The Court

of Appeals removed all question of the propriety of the petition under Chapter XI of the Bankruptcy Act. It found and held as stated in its opinion Record P. 135; "M. A. Owens Company's original petition was obviously defective for failure to allege an essential fact, i.e. its insolvency or inability to pay its debts as they mature. The petition therefore, was subject to dismissal out of hand. Certainly the corporation's motion to dismiss its petition was entitled to favorable action even without a hearing." There was no amendment to the petition. Where did the contents of the petition change so that the Courts acquired jurisdiction. It is apparent that if the Referee had performed his duty the case would have been dismissed. The jurisdiction of the Court was lacking in the original petition and is lacking still in the petition as it now stands, no amendment ever having been made. It is hardly conceivable that the court would have reversed a dismissal order of the referee. Yet there is nothing altering the basic petition to this very date.

> "The decree of the Court of Equity upon oral allegations, without written pleadings, would be an idle act, of no force beyond that of an advisory proceeding of the chancellor. And the reason is that the Courts are not authorized to exert their power in that way.
>
> "Jurisdiction is the right to hear and determine; not the right to determine without hearing, and where as in this case no appearance was allowed there could be no hearing or opportunity of being heard, and therefore could be no exercise of jurisdiction. By the act of the court, the respondent was excluded from its jurisdiction." *Windsor* v. *McVeigh*, 93 U.S. 274, 283.

The Court has stated on many occasions that the jurisdiction of the Court must be inquired into *sua sponte*. No motion is required by any party. If the court finds no jurisdiction or a lack of a necessary jurisdictional averment it must dismiss the petition *sua sponte*. The Court finds such a lack and said lack is still present. The Court of Appeals is therefore misconstruing the case of *Engel* v. *Tribune Co.*, 189 F.2d 176.

> "The Federal District Court is one of limited jurisdiction and in every case the jurisdictional facts must be alleged affirmatively or the Court is without jurisdiction. . . . All that appears is that plaintiff is incarcerated in the Illinois State Prison at Stateville, Illinois. Thus it is clear that the court lacked jurisdiction."

> "It is true that there are certain essential facts that must exist to give any power to the court. *Noble* v. *Union River Logging Railroad*, 147 U.S. 165, 173. As the existence of those facts are so plainly necessary e.g. process, examples of decisions are rare. Absence of such facts makes the proceedings a nullity. Such case was *Kalb* v. *Feuerstein*, 308 U.S. 433. We there held that the Federal Government in the exercise of its plenary power over bankruptcy had ousted state courts of all independent power over farmer bankrupts. Therefore any subsequent orders in the State Court were void." *United States* v. *Williams*, 341 U.S. 58, 66.

In the light of the finding of lack of essential allegation the Court must dismiss. By its failure to order and direct dismissal on said finding it is negativing the laws now determined without question.

The decision is injecting an element of doubt into the applicability of the generally recognized law that the court having decided and determined that the court has not jurisdiction must dismiss the petition. If the decision stands the security of the oft repeated decision of this Court to the effect that if jurisdiction is lacking the court can proceed no further but must dismiss. If the decision in this case stands the case can be used as a precedent for many other cases in which the Court desires to retain jurisdiction it does not possess. The determination by this court in the cases of *Matson Navigation Co.* v. *United States*, 284 U.S. 352;

> "Want of jurisdiction may be raised at any time."

Also so stated in *Gainsville* v. *Brown Crummer Investment Co.*, 277 U.S. 54.

> "The Court is powerless to act if without jurisdiction." *Concord Casualty and Surety Company* v. *U. S.*, 69 F.2d 78.

> "District Courts are of limited jurisdiction conferred by the Constitution and laws of the United States and depending upon the express provisions of statute." *Klein* v. *Construction Co.*, 260 U.S. 226 and *Hanford* v. *Davies*, 163 U.S. 273.

There being no alegation in the pleadings that tend to establish jurisdiction in the courts of the United States this case can become the basis of a new theory that in the lack of positive allegation that tend to show jurisdiction, the courts may imply jurisdiction from the conduct of the attorney for the pettioner or of petitioner or of the party itself even though during all of the proceedings it stead-

fastly maintained lack of jurisdiction. Its efforts to remove any doubt as to the lack of jurisdiction is to be taken as an admission of jurisdiction itself if this decision stands. The very enthusiasm exercised by the petitioner to comply with the law by causing the dismissal of a case of which the courts have no jurisdiction to hear and decide is used as a justification for deciding that jurisdiction exists. This is not in keeping with established laws and procedures. The laws that are substantiated by the decision of *Mitchell* v. *Maurer*, 293 U.S. 237, 244; "Lack of Federal jurisdiction cannot be waived or be overcome by agreement of the parties. An appellate Federal Court must satisfy itself not only of its own jurisdiction but also of that of the lower court in a cause under review." *Mansfield C. and L.M. RR. Co.* v. *Swan*, 111 U.S. 379, 382. Hence the failure of the Insurance Commissioner to claim in his petition for certiorari that the order of the District Court was void for lack of Federal jurisdiction of the suit and his failure otherwise to call to the attention of this court lack of diversity of citizenship are immaterial." To the effect that jurisdictional averments cannot be supplied by implication is apparently overruled by this decision if allowed to stand.

Therefore it appears that the Court may well grant the writ to preserve and protect one basic and essential determination made by this court from becoming a basis for doubt and a background for weakening the present strength of the decisions now made by this court.

2. The second ground for requesting the granting of the writ of certiorari is the law that is apparently being weakened by this decision that has often been forcibly enunciated by this court and is fundamental to the integrity of our national sense of fair play. The Court of Appeals is overlooking the failure on the part of the Referee to refrain from action on substantial questions to be

decided by him unless he acts upon facts proven by evidence offered for his consideration and by making decisions on important matters without the reception of evidence. The case of *Baltimore and Ohio Railroad* v. *United States*, 264 U.S. 258, 264, 265 is sponsor of this statement, "Congress by using the phrase 'when the Commission is of the opinion, after hearing' prescribed quasi-judicial action— The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it. To refuse to consider evidence introduced or to make an essential finding without supporting evidence is arbitrary action".

Again this court in *Morgan* v. *United States*, 298 U.S. 468, 480, "There must be a full hearing. There must be evidence adequate to support pertinent and necessary findings of fact. Nothing can be treated as evidence which is not introduced as such ,
The Hearing is designed to afford the safeguard that one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. The hearing is the hearing of evidence and argument".

Again in *Interstate Commerce Commission* v. *Louisville & Nashville Railroad*, 227 U.S. 88, 91, "the statute gave the right of a full hearing and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless. And if the Government's contention is correct, it would mean— the Commission could disregard all rules of evidence and capriciously make findings by administrative fiat".

It is clear from the record in the instant case that the referee received no evidence on substantial matters of fact

to be determined by hi and refused to receive evidence thereon. See record P. 22 petition for review. This together with the certifica of the referee P. 24. The petition for review seeks re iew of order of adjudication for among other reasons, "hat at the time of said hearing the Referee announced hat he was going to adjudicate the corporation as a ba krupt," he did not wait for the hearing to finish.

Again "Without a fu hearing the referee after some discussion announced he did not care to hear any more of the matter and refused o permit argument by counsel or evidence."

Again "9) That no ev dence or statement in lieu of evidence agreed to was off red to the referee upon which he could make any findin s of fact." The referee agreed that the errors were as omplained of in said petition for review. His certificate ade in response to the petition for review requesting h n, "For a certification of a summary of evidence submi ted to the referee upon which he acted, relating thereto, as well as the certification of the questions presented co pletely as suggested or required by law or rules of cour" The Referee responded by his certification shown on p ge 24 of the Record, this set forth no summary of evidenc and further stated, "The questions presented are the lleged errors set forth in the petition to review." The f ilure to receive evidence and the action of the referee in absence of his willingness to receive evidence and act hereon are errors set forth in the petition for review.

The failure of the Re eree to act by receiving evidence and to act on the evide e submitted is a failure of jurisdiction to act at all in he circumstances and is grounds for required reversal of the decisions made.

The failure of the C rt to receive and act upon evidence submitted is the xception to the general procedure,

it appears from the record in this case that the refusal of the court to receive and consider evidence and make his determinations upon evidence submitted as required by law is the regular practice. See Record page 21 at which the Referee stated, "and it appearing from *argument* thereat produced that all creditors represented were in opposition to dismissal—".

On page 22 of Record review is claimed for the reason "6) No evidence or testimony was submitted to the Referee on the motion or petition and the statements of counsel were in serious contradiction. Without a full hearing the Referee announced he did not care to hear any more of the matter and refused to permit argument by counsel or evidence."

Page 25 of Record; "3) That said findings were erroneous in that the Court has no justification to hear such a petition. That no evidence or proof of such need or of any need for the appointment of a receiver was offered to the Court."

Again on page 31 of record; "2) No evidence on any question or point was taken by the referee in non conformity with the law expounded in the *Chicago Jct.* case 264 U.S. 258. The alleged hearing did not permit of the introduction of evidence on the compliance with the duty of deciding in accordance with it as stated in the *Chicago Jct.* case."

Page 35 of Record; "1) —no evidence was received by the court in re Adjudication".

Page 38 of the Record; "2) The Court had no evidence, testimony or facts permitting him to enter such an order".

Page 39 of Record; "No evidence of any facts was received by the Court upon which he could make findings of fact upon which to base an order of adjudication."

Page 42 of Record; "4) That although the debtor offered evidence in opposition— the Referee refused to receive

evidence and terminated the hearing without hearing the parties fully or on the issues raised".

Page 51 of Record; "3) —The Referee refused to receive any evidence on this matter and thereby deprived M. A. Owens Company of its right to a full hearing—".

Page 54 of Record; "2) —that the reception of evidence was refused by the Referee—."

Page 57 of Record; "he has not been duly qualified and appointed."

Page 60 of Record; "8) No evidence was received on either adjudication or appointment of a receiver and no agreement of facts was made."

Page 63 of record; "—in reference to said orders was offered for hearing and an order denying hearing thereon was entered; and a further motion was offered to vacate order of confirmation of sale, that hearing thereon was requested and an order denying said hearing was entered."

To all of the petitions for review the referee certified that the errors alleged in the petitions for review of which the above comprise, are the questions presented. Thereby he acknowledged the facts contained in said petitions for review as being in conformity with the truth and there comprise facts in the case. He did not controvert a single such allegation made of deprivation of an opportunity to present evidence upon which he could legally act. He was requested to report the evidence or testimony or a summary of it as required by procedure and did not so report any testimony or evidence on the issues raised herein. Thereby again ratifying the claim of failure to receive and act upon proof of facts. See record page 64; "Wherefore, your petitioner prays your honor certify to the Judge and transmit to the clerk, the Record— including the testimony evidence or a summary thereof—" Again in each petition for review there was requested such report; as for example Page 55 "Your petitioners pray that your

Honor certify to the Judge— and transmit to the clerk the record including the transcript of evidence if there be any or a summary of the evidence if there be no transcript—". To this the Referee filed no response as he could not so file because there was no evidence taken or received. The same condition prevailed throughout the proceedings.

The failure of the Referee to receive and consider evidence on material issues precluded him from jurisdiction to decide the said issues. His powers are limited to performance in accordance with the rights granted. To fail to follow the law in procedure deprived him of jurisdiction to act in any manner. Never has the authority been granted to any party in a Court of the United States whether he be a judge or a referee to make adjudications of important matters without acting on facts proven by him by evidence. Therefore it appears that the referee lacked jurisdiction to adjudicate M. A. Owens Company a Bankrupt until he receives evidence warranting such Adjudication and a proper petition is filed and the proper conditions met. These can never occur for the reason that the said conditions for an order of adjudication do not and have not existed at any time. It therefore appears that a new precedent harmful to the citizenry of our country is commencing namely hearing of important matters by our courts in entire disregard of the requirements of proof. The Court it seems should not permit such procedure to become a precedent upon which further disregard of due process can be predicated.

3. The third jurisdictional requirement lacking in the present case is Compliance with the Statutes and the Bankruptcy Act sections 334 and 335 as well as compliance with section 376(2) as claimed.

The act reads in sections 334 and 335 as follows, "Sec. 334— The Court shall promptly call a meeting of creditors;

upon at least ten days notice by mail to the debtor, the creditors and other parties in interest, . . .

"Sec. 335. The notice of such meeting of creditors shall be accompanied by a copy of the proposed arrangement, a summary of the liabilities as shown by the schedules and a summary of the appraisal, if one has been made, or if not made a summary of the assets as shown by the schedules. Such notice may also name the time for the filing of the application to confirm the arrangement and the time for the hearing of the confirmation and of such objections as may be made to the confirmation."

It appears from the record that the notice sent and the only notice sent on the matter is as follows: Record, P. 20; "Notice is hereby given that on the twenty-fifth day of March 1955 the said M. A. Owens Company filed a petition in this court proposing an arrangement with its unsecured creditors under the provisions of Chapter XI, Section 322 of the Acts of Congress relating to Bankruptcy. Notice is further given that on the 28th day of March 1955 the said M. A. Owens Company filed a motion to dismiss the said proceeding.

"Notice is further given that a hearing will be held at 10 A.M. on the 8th day of April 1955 at Room 1132 Federal Building in the City of Boston, Massachusetts upon the said motion to dismiss the said proceeding, at which time consideration will be given as to whether the debtor should be adjudged a bankrupt or the proceeding dismissed. Dated at Boston, Massachusetts this 29th day of March, 1955. William J. Hession, Referee in Bankruptcy, 1129 Federal Building, Boston 9, Massachusetts." Assuming that the notice was sent on March 29, 1955 the statutory period of ten days would not be complied with if the date of receipt is the crucial date in determination of the ten days notice, required by Sec. 334 of the Act. If the ten days notice by mail means receipt of notice ten days

prior to hearing no notice meeting that requirement was given. However, if the notice aforesaid is intended to fulfill the requirements of Section 334 of the Act as well as section 335 of the Act it is lacking the particularity required by the Act. No notice was ever sent showing the arrangement proposed as required by sec. 335; no notice was ever sent showing a summary of liabilities nor a summary of the Appraisal or a summary of the assets as shown on the schedules, all as required by the Act, sec. 335.

Having failed to act in accordance with the provisions of the Bankruptcy Act the Referee was without jurisdiction to proceed further until he complied. This he never did and therefore all proceedings thereafter appear to be void or new laws are being followed.

However, Section 376(2) is raised by the Referee as a justification for his actions. Passing over the question raised heretofore namely how did he ascertain in any facts in the absence of evidence or proof of any kind but confining to section 376(2) reads as follows: "If the statement of executory contracts and the schedules and statement of affairs as provided by paragraph (1) of section 324 of this Act are not duly filed, or if an arrangement is withdrawn or abandoned prior to its acceptance, or is not accepted at the meeting of creditors or within such further time as the court may fix or if the money or other consideration required to be deposited is not deposited or the application for confirmation is not filed within the time fixed by the Court or if confirmation of the arrangment is refused, the court shall . . .

"(2) Where the petition was filed under section 322 of this act, enter an order, upon hearing after notice to the debtor, the creditors and such other persons as the Court may direct, either adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with pursuant to the provisions of this Act or dismissing the proceeding under

this chapter, which ever in the opinion of the Court may be in the interest of the creditors."

Analyzing the said sections we find that the statement of affairs marked Exhibit 2 was filed with the petition verified under oath and containing a full and true statement of his affairs as required by the provisions of the Act. See Record page 5. That the statement of executory contracts was filed and in exhibit one as filed there being no executory contracts of the Corporation. See Record page 5, lines 1 to 4 incl. No claim has ever been made that the M. A. Owens Company did not file the required statements. The next contingency is the withdrawal or abandonment of the arrangement; no where in the Record is there any suggestion of withdrawal of the arrangement or abandonment of it. The petitioner prayed for dismissal of the petition for lack of jurisdiction in the Court. If there was jurisdiction the dismissal would not become effective until approved by the Court. This never occurred so that the arrangement was never withdrawn or abandoned by the petitioner in jurisdiction existed. The petitioner being confronted by threat of adjudication if it obtained dismissal of its petition withdrew its motion to dismiss leaving the plan in full effect in jurisdiction existed. How that condition could possibly be construed as a withdrawal of the arrangement or abandonment prior to acceptance is contrary to the language used. To remove the question of language construction the motion for dismissal was withdrawn leaving the plan in effect prior to action by the Court upon the motion. Therefore no one was harmed or prejudiced in any way by the motion to dismiss. The Court of Appeals clearly saw the obligation at this point of dismissal even without hearing on the motion. The referee saw things differently and threatened adjudication as bankrupt on said motion. The withdrawal of the motion was not in a sense of the word a withdrawal

of the plan if jurisdiction existed in the Court to entertain the petition.

The act if the referee in disregarding the law and ordering adjudication runs contrary to statute quoted herein also contrary to the opinion of the Court of Appeals in this case and is contrary to any jurisdiction granted to the referee. The law only gives him jurisdiction to adjudicate as bankrupt the petitioner that fulfills the conditions of section 376. The said conditions were never fulfilled by the M. A. Owens Company. It did not fail to file if required so to do, the statement of affairs, the statement of executory contracts or the schedules nor did it abandon or withdraw its proposed plan of arrangement. Moreover the acceptance of the plan was never made available to creditors for acceptance for the notice of meeting for acceptance was never sent out by the referee in accordance with sec. 334 and 335 of the Act. Therefore there was no proper meeting of creditors and consequently there was never a time set for deposit of any money within the time set by the court. Therefore there was never any time when any condition permitted the Referee to enter any orders of adjudication as a bankrupt, even if other conditions had been favorable. Confirmation of course never having been submitted to the referee on acceptance or rejection by creditors after notice required was never refused by the referee. The referee never permitted the creditors to be notified of the arrangement offered and thereby never set the time or conditions for acceptance of the arrangement.

The Claim is now made as it has been consistently throughout the litigation that the Referee did not have the jurisdiction to order adjudication of M. A. Owens Company as a Bankrupt for the reason that the conditions needed for said jurisdiction never came into being. There-

fore the adjudication was beyond his powers under the conditions prevailing.

This constitutes a deprivation of property without due process of law and a violation of amendment 4 of the Constitution of the United States.

The Court may well grant the writ to issue to prevent the establishment of a precedent to be used in the future as a justification for disregard of the Constitutional safeguards so zealously incorporated in our United States Constitution. No due process has been invoked but the M. A. Owens Company property is to a great extent out of its possession by reason of the orders of the Referee taken improperly and without jurisdiction. Reviews of these orders were taken to the judge of the District Court and appeals from his sustaining of orders of the referee to the Court of appeals. The question of jurisdiction is clearly raised by the Appellant in the petition for review on page 64 of the record. Appeal was taken from all reviews by the Appellant to the Court of Appeals on Page 77 of the record.

However, it appears that entirely apart from the appeals taken and apart from the reviews claimed the court of its own motion is obliged to see to it that the Referee as well as the Judge of the District Court does not exercise a jurisdiction not entrusted to them. If no appeal were filed by any party and if no review were claimed by the parties the Court would apparently under the laws be obligated to act upon notice merely and direct dismissal of a proceeding over which the Courts below have no jurisdiction to act as they have acted.

See (citations and excerpts).

As it appears that the Court below has so far departed from the decided policy of law as determined by the Supreme Court request is made that the Writ of certiorari issue.

Conclusion

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

Angus M. MacNeil
547 Somerville Ave.
Somerville, Mass.
Attorney for Petitioner

Appendix A

AMENDMENT V TO CONSTITUTION OF U. S.

No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Appendix B

United States Court of Appeals
For the First Circuit

No 4999.

A M. MACNEIL,
APPELLANT,
v.
BENJAMIN GARGILL, TRUSTEE,
APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS.

Before MAGRUDER, *Chief Judge*, and WOODBURY and HARTIGAN, *Circuit Judges*.

Angus M. MacNeil, pro se.
Louis J. Shrair, with whom *Gargill & Shrair* was on brief for appellee.

OPINION OF THE COURT.
March 30, 1956.

WOODBURY, *Circuit Judge*. M. A. Owens Company, M. A. Owens Cafe, Inc., and MacNeil Bros. Company, all Massachusetts corporations, and Angus M. MacNeil individually all appealed to this court from two orders of the court below affirming a variety of orders entered by a Referee in Bankruptcy. The appeals of the three corporations were dismissed in this court for failure to file proper bonds, leaving Angus M. MacNeil the sole appellant. And he has appeared in this litigation in two capacities. He appeared as counsel of record for the three corporations named above, and he also appears *pro se* to protect his

rights as an alleged mortgagee of certain personal property of M. A. Owens Company which was adjudicated a bankrupt under the following circumstances.

M. A. Owens Company was engaged in the business of operating a cafe and restaurant in Boston until sometime early in 1955 when, counsel for appellee tells us (without contradiction by appellant) and the record and original papers indicate, the appellee Gargill was appointed a state court receiver and as such took possession of the corporation's assets and proceeded to operate its business. At any rate on March 23, 1955, the stockholders of M. A. Owens Company voted unanimously at a special meeting called for the purpose to authorize Angus M. MacNeil, who was apparently one of its principal officers, to prepare, submit, and present a petition for an arrangement with the corporation's creditors under Chapter XI of the Bankruptcy Act, and to propose a plan which would protect the interests of the corporation. MacNeil set about his duties at once and on March 25 he filed a petition under § 322 of Chapter XI proposing an arrangement and plan. But he prepared this petition on a printed official form from which he deleted the allegations that the corporation was insolvent or unable to pay its debts as they matured. Schedules attached to the petition listed property of M. A. Owens Company having a value of $37,968 ($25,968 for equipment and fixtures and $12,000 for licenses) and debts amounting to $25,414.67, $23,000 of which was listed as due to MacNeil on a mortgage of its personal property. No allowance whatever was made to meet the claims of twelve creditors listed as to name but not as to amount, the validity of whose claims was said to be unknown.

Apparently MacNeil soon discovered that his Chapter XI petition was defective for failure to comply with the mandate of § 323 thereof wherein it is provided that "A petition filed under this chapter shall state that the debtor

is insolvent or unable to pay his debts as they mature, . . . " for on March 28 MacNeil filed a motion that the corporation's petition "be dismissed before any further action is taken thereon." On March 29 the Referee in Bankruptcy to whom the petition had been referred notified the corporation and its listed creditors of the filing of the petition and of the motion to dismiss it, and gave notice that on April 8 at 10:00 A.M. a hearing would be held at a stated place "at which time consideration will be given as to whether the debtor should be adjudged a bankrupt or the proceeding dismissed." On the same day, acting on the petition of two of the twelve creditors who were listed as having claims of unknown validity, the Referee appointed the state court receiver, Gargill, the appellee here, Receiver in Bankruptcy and gave him authority to operate the debtor's business.

On April 8 before the time set for the hearing MacNeil appearing on behalf of M. A. Owens Company filed a motion to withdraw its motion to dismiss "leaving the petition and the original plan in force and effect as originally filed." At the same time one of the twelve creditors mentioned above filed an objection to the allowance of the debtor's motion to dismiss its petition.

The record does not disclose what transpired at the hearing on April 8. Its results, however, are clear enough. The Referee denied M. A. Owens Company's motion to withdraw its motion to dismiss, denied its motion to dismiss, adjudicated it a bankrupt, and allowed some, at least, of its creditors to elect Gargill, who had served as state court receiver and receiver in bankruptcy, as their trustee. Promptly on April 11, M. A. Owens Company by Angus M. MacNeil filed two petitions for review, one from the order of the Referee appointing a receiver and the other from the order of the Referee adjudicating it a bankrupt. Subsequently M. A. Owens Company by MacNeil filed four

more petitions, making up to this point six in all, for review of various later orders issued by the Referee in the course of the bankruptcy proceeding. The District Court, on May 5, affirmed the orders of the Referee challenged in the first three petitions mentioned above and M. A. Owens Company at once filed notice of appeal. We see no occasion to state the matters covered in these petitions in detail. It will suffice to say that at least one of them squarely raised the question of the jurisdiction of the Referee to adjudicate M. A. Owens Company a bankrupt.

Finally, on May 27, M. A. Owens Company, M. A. Owens Cafe, Inc., and MacNeil Bros. Company, all by Angus M. MacNeil, and Angus M. MacNeil personally filed another petition for review—this time of an order of the Referee confirming a private sale by the trustee of M. A. Owens Company's liquor license. It, like some of its predecessors, includes the assertion that the court is without jurisdiction over the entire proceeding for the reason that there was no allegation or proof that M. A. Owens Company was insolvent or unable to pay its debts as they mature. On June 3 the District Court affirmed the Referee's orders challenged in the last four petitions. The three corporations and MacNeil on June 4 filed notice of appeal to this court from both orders of the District Court, that is to say, from its order of May 5 covering the first three petitions for review and also from its order of June 3 covering the remaining four petitions.

The corporations, as already noted, are no longer appellants. MacNeil personally is the only one left. And he argues two questions: first the question of jurisdiction to adjudicate M. A. Owens Company a bankrupt and second, if that question be answered in the affirmative, the validity of all of the Referee's orders affirmed by the District Court, but principally his order confirming the Trustee's private sale of the corporation's liquor license.

We entertain serious doubt whether Angus M. MacNeil personally has any standing to assert lack of jurisdiction to adjudicate M. A. Owens Company a bankrupt. His challenge would seem to constitute a collateral attack upon a judgment entered after litigation of the jurisdictional issue. However we pass the question for we think it clear that there was jurisdiction to adjudicate M. A. Owens Company a bankrupt.

M. A. Owens Company's original petition was obviously defective for failure to allege an essential fact, *i.e.* its insolvency or inability to pay its debts as they mature. The petition, therefore, was subject to dismissal out of hand. Certainly the corporation's motion to dismiss its petition was entitled to favorable action even without a hearing. But the Referee, instead of dismissing at once, chose to hold a hearing on the petition and the motion to dismiss it, perhaps in the hope of clarifying a situation already becoming confused, and we cannot see how a hearing could prejudice anyone. But at the time of the hearing the situation had radically changed because before it began the corporation moved to withdraw its motion to dismiss "leaving the petition and the original plan in force and effect as originally filed." MacNeil admits in his brief that he knew when he filed his motion to dismiss that the benefits of Chapter XI were available only to those who were insolvent or unable to meet their debts as they mature. He, therefore, cannot be heard to assert inadvertence or mistake when he moved to withdraw that motion. The motion to withdraw the motion to dismiss must have been intended to mean something and we think its only meaning could be that M. A. Owens Company wished to avail itself of the benefits of Chapter XI in the only way it could, that is, by confession of its insolvency or inability to pay its debts as they matured. In short we consider the motion to withdraw the motion to dismiss, in view of the circumstances under

which it was filed, as tantamount to a deletion of the cancellation on the original petition of the allegation of insolvency or inability to pay debts as they mature. Thus the defect in the original petition was cured by the petitioner's subsequent pleadings. At the time of the hearing on April 8, therefore, the Referee could properly, as he evidently did, consider the petition in the light of the pleadings as admitting what the state court receivership rather clearly indicates to be the fact, that is, that M. A. Owens Company was insolvent in the statutory sense. Indeed, any other interpretation of the pleadings would seem to indicate that MacNeil was deliberately flouting the vote of the stockholders of M. A. Owens Company at their special meeting on March 23 authorizing him to prepare, file, and prosecute a Chapter XI arrangement for the corporation. Certainly MacNeil cannot be heard to claim the benefits of Chapter XI for his corporate client and at the same time deny the existence of a fact which he knows to be essential to a Chapter XI proceeding. Construing the pleadings as we do and assuming in the absence of anything in the record to indicate the contrary that the creditors at the hearing held by the Referee on April 8 rejected the arrangement offered by M. A. Owens Company, it is clear that the Referee had the power under § 376 of Chapter XI to adjudicate it a bankrupt if he thought, as evidently he did, that course to be in the best interest of the creditors.

Turning now to the merits we find ourselves confronted with further procedural difficulties. While we have assumed arguendo that MacNeil can properly raise jurisdictional questions here now, the correctness of that assumption is by no means clear. We now go on to consider whether he can have review of non-jurisdictional questions by the method he has selected.

MacNeil personally is seeking appellate review of all of the orders of the Referee affirmed by the District Court

both in its order of May 5 and in its order of June 3. But he did not, personally, petition the District Court for review of any order of the Referee except the one of May 17 approving the Trustee's sale of M. A. Owens Company's liquor license. The question, therefore, arises whether MacNeil has any standing in this court to challenge orders of the District Court affirming orders of the Referee which MacNeil never asked the District Court to review in accordance with the provisions of § 39(c) of the Bankruptcy Act, 52 Stat. 858, 11 U.S.C. § 67(c), quoted in material part in the margin.*

This section provides an adequate method for the review of orders of a Referee in Bankruptcy. We do not see any reason why the method outlined in it should not be exclusive or why its provisions should not be strictly construed. MacNeil's failure to follow or even attempt to comply with its terms deprived him of standing in the District Court to question the Referee's orders, except the last one, and not being a party below he has no standing here. See *L. & R. Wister & Co.*, 237 Fed. 793 (C.A. 3, 1916); In re *Bender Body Co.*, 139 F.2d 128 (C.A. 6, 1943).

His contentions with respect to the only order of the Referee which he sought to have reviewed below and hence the only one he can challenge here, that is, the order confirming the Trustee's sale of M. A. Owens Company's liquor license, are too insubstantial to warrant detailed consideration or even discussion. It will be enough to say that an examination of the record discloses ample support for the Referee's action.

The Orders of the District Court are affirmed.

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* A person aggrieved by an order of a referee may within ten days after the entry thereof, or within such extended time as the court may for cause shown allow, file with the referee a petition for review of such order by a judge and serve a copy of such petition upon the adverse parties who were represented at the hearing. Such petition shall set forth the order complained of and the alleged errors in respect thereto.

Appendix C

CONFLICTING OPINIONS.

1.) Excerpts from the Decisions of U. S. Supreme Court concerning the moving by the Court *sua sponte* on matters of jurisdiction.

As was stated in *Noble* v. *Union River Logging Railroad*, 147 U.S. 165, 173. "It is true that in every proceeding of a judicial nature there are one or more facts which are strictly jurisdictional, the existence of which is necessary to the validity of the proceedings, and without which the act of the Court is a mere nullity; such, for example, as the service of process within the State upon the defendant in a common law action. *D'Arcy* v. *Ketchum*, 14 How. 165; *Webster* v. *Reid*, 11 How. 437; *Harris* v. *Hardiman*, 14 How. 334; *Pennoyer* v. *Neff*, 95 U.S. 714; *Borden* v. *Fitch*, 15 Johns 121; the seizure and possession of the res within the bailiwick in a proceeding in rem, *Rose* v. *Himel*, 4 Cranch 241; *Thompson* v. *Whitman*, 18 Wall. 457; a publication in strict accordance with the statute, where property of an absent defendant is sought to be charged. *Galgin* v. *Page*, 18 Wall. 350; *Guaranty Trust Co.* v. *Green Cove Railroad*, 139 U.S. 137. So, if a court appoint an administrator of the estate of a living person, or in a case where there is an executor capable of acting, *Griffith* v. *Frazier*, 8 Cranch 9; (or condemns as lawful prize a vessel that was never captured); or the Land Department issues a patent for land which has already been reserved or granted to another person, the act is not voidable merely, but void. In those and similar cases the action of the Court or officer fails for want of jurisdiction over the person or subject matter. The proceeding is a nullity, and its invalidity may be shown in a collateral proceeding. *Rose* v. *Himely*,

4 Cranch 241, 269; or a court-martial proceeds and sentences a person not in the military or naval service; *Wise* v. *Withers*, 3 Cranch 331."

Atlas Life Insurance Company v. *United States*, 306 U.S. 563; "It is the duty of a Federal Court to determine a question of its jurisdiction sua sponte though not raised by either party."

In re National Labor Relations Board (1938) 304 U.S. 486; "Jurisdiction means in one sense the power to hear and determine the controversy presented but a court has jurisdiction in another sense to determine whether such power is conferred upon it in circumstances disclosed and if it finds such power is not granted it lacks jurisdiction of the subject matter and must refrain from an adjudication of rights in connection therewith."

Minnesota v. *Hitchcock*, 185 U.S. 373; "It is the duty of every court of its own motion to inquire into the matter of its jurisdiction of the subject matter of a suit irrespective of the wishes of the parties and to be careful that it exercise no powers than those conferred by law."

Ex parte McCardle, 143 U.S. 339; "A court cannot proceed at all in any cause without jurisdiction but must announce the fact and dismiss the cause."

Reed v. *U. S.*, 211 U.S. 529; "Jurisdiction is not a matter of sympathy or favor the courts are bound to take notice of the limits of their authority."

Cheriot County Drainage District v. *Baxter State Bank*, 308 U.S. 371; "The lower Federal Courts are all courts of limited jurisdiction having only the jurisdiction which Congress has prescribed."

2.) The decisions of the Supreme Court concerning dismissal for lack of jurisdiction.

Matson Navigation Co. v. *United States*, 284 U.S. 352; "Want of jurisdiction may be raised at any time". Also so stated in *Gainsville* v. *Brown Crummer Investment Co.*, 277 U.S. 54.

Concord Casualty and Surety Company v. *U. S.*, 69 F.2d 78; "The Court is powerless to act if without jurisdiction."

Klein v. *Construction Co.*, 260 U.S. 226 and *Hanford* v. *Davies*, 163 U.S. 273; "District Courts are of limited jurisdiction conferred by the Constitution and laws of the United States and depending upon the express provisions of statute."

3.) The decisions of the Supreme Court concerning the requirements of hearings.

As stated in *Windsor* v. *McVeigh*, 93 U.S. 274 and often quoted "The order in effect denied the respondent a hearing. It is alleged he was in the position of an alien enemy, and could have no locus stand in that forum. If assailed there he could defend there. The liability and right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice, 11 Wall. 267. The principal stated in this terse language lies at the foundation of all well-ordered systems of jurisprudence. Wherever one is assailed in his person or his person or his property, there he may defend, for the right and liability are inseparable. This is a principle of natural justice, recognized as such by the common intel-

ligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal." "There must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. Until notice is given, the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization over the subject matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim or charges made; it is a summons to him to appear and speak, if he has anything to say why the judgment sought should not be rendered. A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party, Appear, and you shall be heard; and when he has appeared, saying, 'Your appearance shall not be recognized and you shall not be heard.' In the present case the District Court not only in effect said this, but added a decree of condemnation reciting that the default of all persons had been duly entered. It is difficult to speak of a decree thus rendered with moderation; it was in fact a mere arbitrary edict clothed in the form of judicial sentence. The law is and always has been that whenever notice or citation is required the party cited has the right to appear and be heard and when the latter is denied the former is ineffectual for any purpose. The denial to a party in such a case of the right to appear is in legal effect the recall of the citation to him. The period within which the appearance must be made and the right to be heard exercised, is of course a matter of regulation depending either upon positive law or the rules or orders of the court or the established practice in such cases. And

if the appearance be not made and the right to be heard be not exercised within the period thus prescribed the default of the party prosecuted, or possible claimants of the property may of course be entered and the allegations of the libel be taken as true for the purpose of the proceeding. But the denial of the right to appear and be heard at all is a different matter altogether."